> religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336 (footnote omitted).

40. In upholding the constitutionality of section 702, the Court reversed the district court's opinion that the provision was unconstitutional as applied to supposedly "secular" jobs, and rejected the district court's attempt to do just what the Judge in this proceeding did in connection with positions at the Church's Stations -- i.e., to arrogate to itself the role of determining whether particular jobs were "properly" considered religious by a church. Amos, 483 U.S. at 333 n.13. The concurring opinion of Justice Brennan described how the process of second-guessing a church's determination that, for example, certain secretarial functions make it desirable to have religious knowledge, raises grave threats to First Amendment rights to the free exercise of religion:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

Id. at 343-44 (Brennan, J., concurring) (citation omitted).[7/]

7/ In his concurrence, Justice Brennan emphasized "[t]he risk of chilling religious organizations is most likely to arise with respect to non-profit activities." Amos, 483 U.S. at 344; see also id. at 348-49 (O'Connor , J., concurring) (expressing a similar view). Justice Brennan's contrast, however, was to church operations which were organized as "profit-making commercial enterprise[s]" or as "for profit corporations," where he believed the exemption should not be applied. Id. Justice Brennan's proposal for a limit on the

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41. The Court's reasoning in Amos leaves no doubt that the sort of case-by-case analysis of job functions at the Stations in which the ALJ engaged in the ID violated the Free Exercise Clause of the First Amendment and RFRA. Under the applicable test, known as the "Sherbert test" and formally enacted by Congress in the RFRA, a statute may stand only if the law in general, and the government's refusal to allow a race neutral religious exemption in particular, are justified by a compelling interest that cannot be served by less compelling means. Sherbert v. Verner, 374 U.S. 398, 403 (1963); accord Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987); Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981).[8] There is no compelling governmental interest which could justify the FCC's usurpation of the Church's right to define itself by determining the particular job functions at the

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[7](...continued)
exemption is therefore not relevant in this case -- the Stations were operated directly by the non-profit Church, not by a separate for-profit corporation. ID ¶ 7. Perhaps more significant, the essence of Justices Brennan's and O'Connor's concern was that the exemption should apply only to affiliates of a church that are "infused with a religious purpose" or "involved in the organization's religious mission." Amos, 483 U.S. at 344, 349. And, as the Judge correctly found, in the Church's view both of the Stations have always been dedicated to the Church's mission. ID ¶ 8; see also ID ¶¶ 9-17. The communicative functions of the Church's Stations are certainly entitled to higher protection than was the gymnasium that was at issue in Amos.

[8] In Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) ("Smith"), the Court appeared to reject the Sherbert test in announcing a new rule under which a "neutral generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious practices in effect. But the Court distinguished the religious practice at issue in that case -- the ingestion of peyote for sacramental purposes -- from cases where other constitutional protections such as freedom of speech and of the press were involved in conjunction with the Free Exercise clause. Id. at 881, 882. Where, as here, the Church is engaged in communicative functions -- the broadcast activities of the Church's Stations are clearly forms of speech -- the Court acknowledged that the associated rights protected by the First Exercise clause must be afforded the strongest possible protection and that the Sherbert test thus still applied. Id.; see also Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943) (holding that the distribution of religious tracts, even though money was accepted for the literature, "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits"). Moreover, in the RFRA, Congress legislated that the Sherbert test should be used. See supra Note 3.

Stations that require religious knowledge. The Court's decision in Amos establishes that the only candidate for such a compelling interest -- the need to avoid supposed Establishment Clause problems -- is bogus.

42. As the opinions in Amos make abundantly clear, the ID's second-guessing of the judgments of the Church about the need of its employees for religious knowledge unduly burdens the Church's free exercise of its religion. The ID did not provide, and cannot provide, any compelling Governmental interest for stripping the Church of its fundamental First Amendment right to determine which of its job functions should preferably be filled with persons who have knowledge of Lutheran doctrine in order to best fulfill the Church's mission.

43. The Judge may have believed that the FCC's need to avoid supposed Establishment Clause problems resulting from an exemption could provide such a compelling interest because, quoting Faith Center, Inc., 82 F.C.C.2d 1 (1980), recons. denied, 86 F.C.C.2d 891 (1981), he held that an exemption from the prohibitions on religious discrimination would turn religious licensees into a "favored class of licensees," and that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture." ID ¶ 204. If so, this was error: the Court explicitly held in Amos that the kind of exemption created by section 702 does not constitute endorsement of a religion or violate the Establishment Clause. Amos, 483 U.S. at 337-38.

44. To be sure, in the twenty year old decision in King's Garden, a panel of the District of Columbia Circuit rejected a challenge under the Free Exercise Clause of the First Amendment to the FCC's policy allowing religious criteria only for positions directly connected to the "espousal of religious views" of licensees. However, the court of appeals panel's decision was based on its view that the Government would not infringe a licensee's First Amendment rights by drawing lines between secular and religious job functions because "[w]here a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression." King's Garden, 498 F.2d at 61.

The court of appeals panel therefore completely failed to acknowledge the grave dangers, described by the Court in Amos, which result from the process of governmental line-drawing itself. Amos, 483 U.S. at 336.[9/] For this reason, the decision by the panel in King's Garden does not survive the Court's decision in Amos thirteen years later, and is simply no longer good law.

45. The King's Garden court also based its decision that the First Amendment did not prevent the FCC from intruding on a religious organization's process of self-definition on the contention that any religious entity "confronts the FCC's rules only because [it] has sought out the temporary privilege of holding a broadcasting license." King's Garden, 498 F.2d at 60. But the type of distinction between rights and privileges used by the King's Garden court to make this argument is no longer viable. See, e.g., American-Arab Anti-Discrimination Committee v. Reno, 883 F. Supp. 1365, 1375 (C.D. Calif. 1995) ("The Court refuses to revive the right-privilege distinction, oft declared dead by the Supreme Court."). The FCC is simply not free to condition grant of broadcast licenses on a religious entity's willingness to give up its exercise of religious freedoms. RFRA, 42 U.S.C. §2000bb-1; Sherbert v. Verner, 374 U.S. 398 (1963). Nor can the Commission refuse to license radio stations to religious groups, thereby destroying an enormous source of diversity in broadcasting and creating equal protection issues. Finally, it should be noted that the Church was exercising its First Amendment rights in radio broadcasts long before the Commission began licensing stations. ID ¶ 7. The Commission cannot now argue that the Church knowingly surrendered these constitutional rights when its broadcast operations became regulated, nor can the Commission argue that the Church's rights to the free exercise of religion have somehow "evaporated" with the passage of time.

9/ The dangers of such an inquiry are graphically illustrated by the intrusive questioning that occurred in this case. First, the staff asked the Church to explain what aspects of particular positions required theological training. (MM Bur. Ex. 13). Then, at the hearing, FCC counsel and the Judge questioned Mr. Stortz about whether it was really helpful for secretaries to have knowledge of the Lutheran calendar in order to deal adequately with the Church's clergy, an inquiry that necessarily delved into theological matters. Tr. 734-737.

2. The ID's Intrusion on the Church's Process of Self-Definition Also Violates the National Policy Enacted by Congress in Section 702 of the Civil Rights Act

46. Even assuming arguendo that the ID does not violate the First Amendment, the ID's holding would still be in direct conflict with the standards established by Congress in section 702. As Judge Bazelon stated in concurring in King's Garden, "[t]he Commission's mandate to act in the 'public interest' does not empower it to contravene an explicit Congressional policy" that permits religious entities to use religious knowledge as a criterion for any and all of their job functions. King's Garden, 498 F.2d at 61. Judge Bazelon stated, however, that the FCC could ignore section 702 because that provision was unconstitutional. Id. But now that the Supreme Court held in Amos that section 702 is constitutional, the FCC no longer remains free to contravene the national policy enacted in that provision.[10/]

47. The two judge majority in King's Garden refused to find that section 702 established a national policy applicable to the FCC in the absence of legislative history explicitly stating that Congress intended the policy to apply to the FCC as well as directly to Title VII. King's Garden, 498 F.2d at 59. The majority based its claim that some sort of explicit legislative history was necessary, however, on its view that section 702 was "of very doubtful constitutionality" (id. at 53), stating that "it is very dangerous indeed to inflate a constitutionally doubtful statute into a 'national policy' having force beyond the statute's literal command." Id. at 57. After the Supreme Court's Amos decision in 1987, the question became the opposite of the one asked by the King's Garden majority; i.e., the question was now whether there was any good reason to believe that the perfectly constitutional national policy in section 702 was not intended to apply to the FCC. There is no such reason. It is surely just as important under the FCC's rules as it is under Title VII to have an exemption that avoids the second-guessing of a church's use of religious job criteria, and therefore avoids a situation in which a church's "process of self-definition [will] be shaped in part by the prospects of litigation"

10/ It should be noted that the Commission has never even considered the effect of Amos on its policies for religious licensees. Indeed, to the best of the Church's knowledge, the Commission's first formal action subsequent to Amos in connection with its religious licensees was the HDO in this case.

and which "both produce[s] excessive government entanglement with religion and create[s] the danger of chilling religious activity." Amos, 483 U.S. at 343-44 (Brennan, J., concurring).[11/]

C. The ID's Application of the EEO Rule To The Stations Violated the Church's Rights Under the Fifth and First Amendments

48. The Church and its Stations have demonstrated their commitment to nondiscrimination on the grounds of race. ID ¶¶ 36-49. The Church firmly believes that all persons are equal in the eyes of God, and firmly supports the goals underlying the Commission's EEO Rule. The Church actively seeks members from all races and has, for many years, supported the goals of affirmative action through its own affirmative action policies. The Church must reject, however, any attempt by the Government to impose on it specific employment steps that are based on racial classifications insofar as those steps impede its ability to use religious preferences in hiring. See Texas v. Johnson, 491 U.S. 397, 418 (1989) ("It is not the State's ends, but its means, to which we object."). Instead, the Church should have the right to pursue its own affirmative action policies among its minority members for positions that it believes must be filled by members of the Church. In Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) ("Adarand"), the Court held that the use of racial classifications by the federal government must meet strict scrutiny, i.e., such classifications must serve a compelling governmental interest and must be narrowly tailored to further that interest. The FCC's EEO Rule and policies use racial classifications that have not been shown to be justified under this test, particularly when weighed against the Church's First Amendment right to hire members of its own faith.

49. The FCC's affirmative action requirements use racial classifications and mandate race-based actions. In 1994, the Commission attempted to justify the EEO Rule by stating that the Rule promoted "diversity of programming on broadcast stations." Policy Statement, 9 FCC Rcd. 929, at ¶ 12.[12/] But the

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11/ The strength of the Congressional policy at issue was evidenced and reinforced by the enactment of the RFRA by Congress in 1993. 42 U.S.C. § 2000bb-1. There is no compelling reason for the FCC to disregard this national policy.

12/ In support of this purported rationale for its affirmative action rules, the FCC cited Metro

(continued...)

EEO Rule and policies as they were applied to the Church's Stations in the ID -- i.e., without any acknowledgment of the need to narrowly tailor the Rule to accommodate the compelling First Amendment rights of the Church to engage in its own "process of self-definition" -- certainly does not advance diversity. Rather, it sacrifices the diversity represented by religious broadcasters. No governmental interest rises to the level of "compelling" when balanced against the countervailing First Amendment interests, eloquently described in Amos, which would be impinged by the Judge's application of the EEO Rule to the Church in the ID. Accordingly, the ID's ruling that the Church runs afoul of the EEO Rule violated the Fifth and First Amendments and must be reversed.

CONCLUSION

Based on the foregoing, the Church respectfully requests the Review Board to reverse the Presiding Judge's conclusion that the Church lacked candor, to eliminate the $50,000 fine for lack of candor and to rule that the Church substantially complied with the Commission's EEO Rule and policies during the entire License Term.

Respectfully submitted,

THE LUTHERAN CHURCH-MISSOURI SYNOD

By: _____

Richard R. Zaragoza
Kathryn R. Schmeltzer
Barry H. Gottfried
Scott R. Flick

Its Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA
2001 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20006
(202) 659-3494
Dated: November 1, 1995

[12/](...continued)
Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). In Adarand, the Court overruled Metro Broadcasting. Adarand, 115 S. Ct. at 2113.

CERTIFICATE OF SERVICE

I, MARIONETTA HOLMES, a secretary for the firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that I have this 1st day of November 1995, mailed by First Class, United States mail, postage paid, the foregoing "LIMITED EXCEPTIONS OF THE LUTHERAN CHURCH-MISSOURI SYNOD" to the following:

*The Honorable Joseph A. Marino
Chairman
Review Board
Federal Communications Commission
2000 L Street, N.W., Room 211
Washington, D.C. 20554

*The Honorable Marjorie R. Greene
Member, Review Board
Federal Communications Commission
2000 L Street, N.W., Room 206
Washington, D.C. 20554

*Allan Sacks, Esq.
Chief for Law
Review Board
Federal Communications Commission
2000 L Street, N.W., Room 205
Washington, D.C. 20554

*The Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 228
Washington, D.C. 20554

*Robert Zauner, Esq.
Federal Communications Commission
Mass Media Bureau
2025 M Street, N.W., Room 7212
Washington, D.C. 20554

David E. Honig, Esq.
Minority Media Ownership & Employment Council
3636 16th Street, N.W., Suite 366
Washington, D.C. 20010

Marionetta Holmes

Marionetta Holmes

*Via Hand Delivery